

US EPA ARCHIVE DOCUMENT

SETTLEMENT AGREEMENT

1. This Settlement Agreement is entered into this 23d day of December, 1998 (hereinafter the "Effective Date") among Plaintiffs Patricia Bragg, James W. Weekley, Sibby R. Weekley, the West Virginia Highlands Conservancy, Harry M. Hatfield, Carlos Gore, Linda Gore, Cheryl Price, and Jerry Methena and Federal Defendants Colonel Dana Robertson, District Engineer, U.S. Army Corps of Engineers, Huntington District, Lieutenant General Joe N. Ballard, Chief of Engineers and Commander of the U.S. Army Corps of Engineers, and Michael D. Gheen, Chief of the Regulatory Branch, Operations and Readiness Division, U.S. Army Corps of Engineers, Huntington District.

2. This Settlement Agreement resolves all of the claims Plaintiffs brought against the Federal Defendants seeking declaratory and injunctive relief against the Federal Defendants for their alleged failure to carry out their statutory duties under the Clean Water Act ("CWA"), 33 U.S.C. § 1344, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., which are the subject of the lawsuit captioned Bragg, et al. v. Robertson, et al., Civ. No. 2:98-0636 (S.D.W. Va.).

3. This Settlement Agreement is entered into voluntarily by and among each of the Plaintiffs and each of the Federal Defendants. Plaintiffs and the Federal Defendants agree to undertake all actions required by the terms and conditions of this Settlement Agreement.

4. This Settlement Agreement shall not be construed to prejudice Plaintiffs' right to challenge actions, including the legality of valley fills in waters of the United States and waters of the State, under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 120 et seq., and the approved state program.

5. The parties to this Settlement Agreement agree that this Settlement Agreement has been negotiated by the parties in good faith, that settlement of all the claims against the Federal Defendants in this case will avoid prolonged and complicated litigation among the parties, that this Settlement Agreement is fair, reasonable, and in the public interest in accordance with the CWA, NEPA, and the APA.

6. This Settlement Agreement is binding upon each of the Plaintiffs, and their respective heirs, successors and assigns. Any change in ownership or corporate or legal status, including but not limited to, any transfer of assets or real or personal property shall in no way alter the status or responsibilities of the Plaintiffs or the Federal Defendants under this Settlement Agreement.

RELIEF

Long-Term Approach: Environmental Impact Statement

7. The U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), the Office of Surface

Mining ("OSM"), and the U.S. Fish and Wildlife Service ("FWS") (collectively the "Federal Agencies"), and the State of West Virginia Department of Environmental Protection ("WVDEP") will enter into an agreement to prepare an Environmental Impact Statement ("EIS") on a proposal to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills. The parties intend that the EIS will be completed no later than 24 months after the Effective Date of this Settlement Agreement.

8. The Federal Agencies agree to afford Plaintiffs reasonable opportunities to meet with the Federal Agencies to inform the development of the scoping document for the EIS consistent with the provisions of NEPA.

9. Consistent with all applicable federal contracting requirements, the Federal Agencies will attempt to retain John Morgan, a mining engineer, and Bruce Wallace, a biologist, or a different mining engineer or biologist who is mutually acceptable to the parties, as consultants to assist the agencies in preparing the EIS. Plaintiffs may also nominate and the Federal

Agencies will attempt, consistent with all applicable federal contracting requirements, to retain a third consultant who is mutually acceptable to the parties, to assist the Federal Agencies in preparing the EIS.

10. The parties agree that from time to time the Federal Agencies shall provide Plaintiffs, free of charge, with a copy of the documents that comprise the administrative record for the EIS. The parties further agree that EPA shall provide Plaintiffs as soon as practicable with a copy of any related public notices that EPA generates.

Interim Approach: Memorandum of Understanding

11. Prior to the completion of the EIS process and issuance of any record(s) of decision, any application for mountaintop mining operations in the State of West Virginia that would result in more than minimal adverse effects in waters of the United States will require an individual Corps permit under CWA section 404 for all overburden and other fill material (hereafter "fill") in waters of the United States. As a general matter, any mining operation in the State of West Virginia that proposes to discharge fill in waters of the United States draining a watershed of 250 acres or more shall be considered to have more than minimal adverse effects in waters of the United States and require an individual CWA section 404 permit. The Corps and EPA will also specifically evaluate the number of watersheds to be

affected by the proposed discharge of fill material to inform the Corps' determination of whether or not the cumulative adverse impact to waters associated with a particular mining operation is minimal. In addition, if the Corps determines that a discharge of fill material into waters of the United States draining a watershed of 250 acres or less would cause more than minimal adverse environmental effects (e.g., on endangered or threatened species or Federal trust resources under the FWCA) the Corps will require the processing of an individual CWA section 404 permit. If the Corps determines that the discharge of fill material into any water of the United States under an individual CWA section 404 permit or a nationwide permit may affect an endangered or threatened species, the Corps will consult with the FWS. All such proposed operations requiring an individual CWA section 404 permit will be subject to the inter-agency process described below.

12. An inter-agency coordination process will be implemented to ensure compliance with all applicable federal and state laws and guidance, improve the permit process, and minimize any adverse environmental effects associated with excess spoil created by mountaintop mining operations in West Virginia. The inter-agency process will be governed by a Memorandum of Understanding ("MOU") entered into among the following agencies: EPA, the Corps, OSM, FWS, and the WVDEP. Under the coordination

process, WVDEP will notify upon permit application the signatory agencies to this MOU of any permit application for surface coal mining and reclamation operation that would result in a discharge into waters of the United States requiring a CWA permit. Where an individual CWA section 404 permit will be required, the signatory agencies would then initiate a process of consultation and coordinated evaluation of the proposed individual permits. The goal of the process is coordinated permit decisions that minimize adverse environmental effects.

13. The process will result in the issuance or denial of a CWA section 404 permit by the Corps, a CWA section 401 certification by WVDEP, a CWA section 402 ("NPDES") permit by WVDEP, and a permit to engage in surface mining and reclamation operations by WVDEP. The MOU will apply to all such pending and future permits described in paragraph 11 until this MOU is amended or rescinded.

14. The Corps will provide Plaintiffs with actual notice of applications for individual permits for valley fills in waters of the United States and a copy of the permit application free of charge. The Corps will also provide Plaintiffs and their designees with a reasonable opportunity to comment on each of these permit applications.

15. Consistent with controlling principles of fiscal law, EPA shall endeavor to fund or provide a position in the Corps'

Huntington District to provide the Corps with technical assistance in making CWA section 404 authorization decisions for valley fills in waters of the United States.

DISMISSAL OF ACTION

16. The Plaintiffs agree to dismiss all claims against the Federal Defendants with prejudice within one business day of the Effective Date of this Settlement Agreement. The parties further agree that Plaintiffs reserve the right to challenge under the APA any future Corps' CWA section 404 authorization for any valley fill in waters of the United States that may be authorized by the Corps after the Effective Date of this Settlement Agreement. The parties further agree that Plaintiffs shall not challenge the Corps' authority under CWA section 404 to authorize discharges of surface mining spoil into waters of the United States based on the argument that such spoil is not fill material pursuant to 33 C.F.R. § 323.2(e).

GENERAL PROVISIONS

17. The parties agree that Hobet Mining, Inc.'s Spruce Mine No. 1 (S-5013-97) is not subject to this Settlement Agreement. Plaintiffs reserve the right to challenge under the APA any Corps' CWA section 404 authorization for discharges associated with this surface mine. As a purely procedural matter, the parties agree that Plaintiffs may seek to present this challenge by amendment to the complaint rather than filing a new action.

The parties further agree, however, that Plaintiffs shall not challenge the Corps' authority under CWA section 404 to authorize discharges of surface mining spoil into waters of the United States associated with Spruce Mine No. 1 (S-5013-97) based on the argument that such spoil is not fill material pursuant to 33 C.F.R. § 323.2(e).

18. Nothing in this Settlement Agreement shall be construed to require the obligation or disbursement of any funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

19. The Federal Defendants agree that they will pay Plaintiffs' reasonable attorneys' fees and expenses for the prosecution of this action. Plaintiffs will provide the Federal Defendants with an itemized fee and expenses bill within 45 days after the Effective Date of this Settlement Agreement. The parties shall endeavor in good faith to reach agreement as to the appropriate amount of attorneys' fees and expenses within 45 days following the Federal Defendants' receipt of the fees and expenses bill. If the parties are unable to reach agreement, the parties shall request the assistance of the Court in resolving the issue before it is litigated.

20. Nothing in this Settlement Agreement shall be construed to make any person or entity not executing this Settlement Agreement a third-party beneficiary to this Settlement Agreement.

21. Except as expressly provided herein, nothing in this

Settlement Agreement shall be construed to limit or modify the discretion accorded the Federal Agencies by the CWA, SMCRA or general principles of administrative law. Nothing in this Settlement Agreement shall be construed to limit or modify the Federal Agencies' discretion to alter, amend, or revise from time to time any actions taken by them pursuant to this Settlement Agreement or to promulgate superceding regulations.

22. The Federal Defendants do not admit any liability arising out of the transactions or occurrences alleged in the lawsuit. The participation of the Federal Defendants in this Settlement Agreement shall not be considered an admission of liability against the Federal Defendants in any judicial or administrative proceeding other than in proceedings to enforce this Settlement Agreement.

23. This Settlement Agreement shall be governed and construed under the laws of the United States.

24. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original Settlement Agreement, and all of which shall constitute one Settlement Agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

25. In computing any period of time prescribed or allowed by this Settlement Agreement, the day of the act after which the

designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

26. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by Plaintiffs and the Federal Defendants. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

27. This Settlement Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement.

28. In the event of a disagreement between the parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice, or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 60 days of such meeting, then Plaintiffs' sole remedy is to refile the

litigation. The Federal Defendants do not waive or limit any defense relating to such litigation. The parties agree that contempt of court is not an available remedy under this Settlement Agreement.

29. The undersigned representative(s) for each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Settlement Agreement and to bind them legally to it.

THE UNDERSIGNED PARTIES enter into this Settlement Agreement in the matter of Bragg, et al. v. Robertson, et al., Civ. No. 2:98-0636 (S.D.W. Va.).

Respectfully submitted,

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DATE: December 23, 1998